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IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL,

Appellants,

vs.

BARNWELL BROS., INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL,

Appellees.

Appeal From the District Court of the United States for the Eastern District of South Carolina

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PETITION OF APPELLEES FOR REHEARING

March 10, 1938.

By J. NINIAN BEALL.
Attorney for Appellees

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Barnwell Bros., Inc., Poole Transportation, Inc., Horton Motor Lines, Inc., et al, Appellees, respectfully represents:

Your Honorable Court, by its opinion filed February 14, 1938, in the above-entitled case, misconceived cer-

tain fundamental facts and the procedure of the parties, and both points are reflected in the decision.

The specific point raised and argued was the effect of the "Commerce Clause" of Article I (8) of the Constitution of the United States, standing alone, on the authority of the State to impose size and weight limitations on motor trucks, which burden interstate commerce, by increasing the cost, diminishing the amount, and diverting the flow thereof. As Appellees understand the decision, this Court held that the bare power contained in the "Commerce Clause" was, in the absence of Federal legislation, inoperative to disturb the judgment of the Legislature of the State with respect to regulations deemed necessary for safety and preservation of the highways, provided they do not discriminate against interstate commerce within the State; and that the District Courts of the United States are without jurisdiction to review, under the "Commerce Clause," the reasonableness of the state acts.

A second point, involving the interpretation and application of the Motor Carrier Act, 1935, was raised in the Bill and passed on by the Court below; however, no Cross Appeal was taken on this point.

Point 1

In the opinion, this Court went beyond the point raised on Appeal and said:

"But as the District Court held, Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic, and has left undisturbed whatever authority in that regard the states have retained under the Constitution."

This statement appears to have the effect of affirming the decision of the Court below on the very impor-

tant point involving the construction of the Motor Carrier Act, 1935, which was not raised on Appeal or by Cross Appeal. Appellees Petition for reconsideration of this statement.

Point 2

The decision on the question of jurisdiction of the Federal Courts to review the "judgment" of State Legislature appears to preclude the Courts from determining whether the State has acted properly under its police power and within its reserved powers, or that it has merely employed these powers as a medium for the invasion of rights to engage in interstate commerce, granted under the Federal Constitution and in derogation of Federal regulation actually established. Appellees Petition for reconsideration to the end that the result stated will not follow.

Point 1

Discussion

The quoted statement follows a reference to Federal aid in the construction of the highways and may have been intended by this Court to refer only to the Federal Highway Aid Acts. This Court referred to the decision of the Court below, which decision referred primarily to the Motor Carrier Act, 1935. Appellees are led to the conclusion that the absence of Cross Appeal, Argument, Brief or Record showing facts relating to the administration of the Motor Carrier Act, 1935, either before this Court, or of a Record before the Court below, has resulted in a serious error of far-reaching results, in that the ruling of the Court below on the interpretation of the Motor Carrier Act, 1935, may appear to have been affirmed.

This is a vital point with respect to which no Cross Appeal was taken, no arguments made, or briefs filed, by either the Appellees or the intervenor, the Attorney General of the United States, nor was any testimony taken by the Court below.

The decision appears to cover the Motor Carrier Act, 1935, and if so construed by District Courts, all efforts to develop a Record of testimony will fail on Motions to Dismiss.

The Interstate Commerce Commission intervened before the Court below, but, pursuant to a definite agreement and understanding, did not intervene before this Court on the present Record. The intervention before this Court by the Attorney General of the United States and the brief filed dealt only with the question of burdens on commerce as they affect the policy of Congress in providing Federal Aid Highways.

None of the Appellees or Intervenors below or before this Court accepted the decision of the Court below as being correct with respect to the effect of the Motor Carrier Act, 1935. Subsequent to the decision by the Court below further proceedings involving the particular question were instituted in other Federal Courts and are now pending.

In at least one of these cases, i.e., *Adams Packing Co., et al* vs. *G. Lee McLain*, individually, and as Adjutant General of the Commonwealth of Kentucky, in the United States District Court for the Eastern District of Kentucky, at Frankfort, the Attorney General of the United States and the Interstate Commerce Commission intervened in connection with the administration and interpretation of the Motor Carrier Act, 1935. In that case Motions to Dismiss have been made, heard, and denied, and the case is awaiting trial on its merits,

at which time the facts should be developed on the Record and then this Court will have the benefit of that Record.

Appellees fear that this Court may have foreclosed all opportunity to develop facts showing the conflict between the Motor Carrier Act, 1935, and state authority. The statement by this Court hereinbefore quoted will probably result in dismissal of these cases and greatly delay, if not defeat, the administration of the Motor Carrier Act, 1935, to the great injury of Appellees and the public.

The broad jurisdiction of this Court in equity proceedings, and judicial notice of statutes, will make it difficult for Appellees to contend before other Courts that the quoted statement was dictum.

Procedural matters contributed to the present difficulty. Appellees recognized the possibility that in an equity appeal the entire bill might be considered and the Motor Carrier Act, 1935, noticed, irrespective of Cross Appeal. But as the Court below was not a court of general equity jurisdiction and the portions of the bill dealing with the Motor Carrier Act, 1935, were, in effect, though not in form, dismissed; for those reasons, Appellees believe that this Court would only consider the points specifically raised by the Appeal. They desired to reserve the point involving the Motor Carrier Act, 1935, until an adequate record could be presented.

The decision of the Court below was not based on a Record in which the essential facts in connection with the Motor Carrier Act, 1935, had been developed. The point was disposed of by the Court below in a manner similar to a dismissal, in that the Court *did not* hear evidence applicable to that question; but consented to

hear evidence only on the question of the unreasonable burden on interstate commerce.

The Court below misconceived the views of the Interstate Commerce Commission, when it said that the Commission denied jurisdiction, and this is evidenced by both prior and subsequent Orders of the Commission as set forth herein.

The quoted statement has the effect of rendering ineffective and unenforceable practically *every provision* of the Motor Carrier Act, 1935. Appellees believe that, in the absence of a Record, it was not the intention of this Court to hold that Congress had not acted in any respect, and had "left undisturbed whatever authority in that regard the States have retained under the Constitution;" or that the Interstate Commerce Commission was without authority to prescribe such regulations as may be necessary to administer the Motor Carrier Act, 1935, in accordance with the numerous specific and general directions of Congress.

If the quoted statement refers to the Motor Carrier Act, 1935, as distinguished from the Highway Aid Acts, it probably goes far beyond what this Court would have said had a Record been made before the Court below and a Cross Appeal taken.

By the Motor Carrier Act, 1935, 49 U. S. C. A. 301, Congress enacted a complete regulatory statute covering transportation by carriers by motor vehicles. It embodied in that single statute the composite field of regulation, which had been developed for railroads, step by step, over a half century of legislation; and in the light of numerous decisions of this Court, covering both discriminations against and burdens on interstate commerce.

The Motor Carrier Act, 1935, is so comprehensive

in scope, general in terms, and inclusive by necessary intendment, that its interpretation would seem to depend *on facts developed on a record, rather than by bare statutory construction.* Record facts would show the conflict between State authority and Federal power actually exercised, either through the Motor Carrier Act, standing alone, or the conflict between the State authority and orders, rules and regulations prescribed by the Interstate Commerce Commission.

Appellees submit that there is a *clear distinction* between Federal Legislation or Commission Regulation of sizes and weights, as such, and Commission Regulation of sizes and weights, *to the extent necessary to prevent the Motor Carrier Act,* 1935, *from becoming a nullity.* Because Congress has not prescribed sizes and weights in an Act and the Commission has not prescribed sizes and weights, *as such,* governing vehicles engaged in interstate commerce, it does not follow that when Congress gave the Commission authority to make "safety regulations", to prescribe "standards of equipment", to require "adequate service", to promote "sound economic conditions", and to prevent "discriminations", that Congress "has left undisturbed whatever authority in that regard the States have retained under the Constitution".

The legislative history of the Motor Carrier Act, 1935, shows that provisions designed to prevent the Interstate Commerce Commission from exercising these powers were eliminated from Bills, rejected by committees, and defeated by vote on the floor. The explanation of the Court below as to the legal reasons for that are now inappropriate, in the light of this Court's decision in this case. The testimony of witnesses before the Congressional Committees quoted by

the Court below was with reference to the Bill as introduced and is hardly indicative of the intent of Congress as expressed in the redrawn Bill and the Act as passed.

MOTOR CARRIER ACT, 1935

49 U. S. C. A. 301

The following provisions of the Motor Carrier Act and its legislative history are referred to by subjects for the purpose of showing the extent to which Congress has acted, with respect to the regulation of motor carriers and more specifically to the extent to which such regulations *necessarily involve some jurisdiction over sizes and weights of motor vehicles.*

The Provisions of the Act

The specific sections of the Motor Carrier Act and the terms which include sizes and weights on the principle that the "greater includes the lesser" are as follows: Section 202(b), "facilities * * * transportation"; Section 203(a)(19), "vehicles"; Section 203(b), "standards of equipment"; Section 203(b)(18), "standards of equipment"; Section 204(a)(1), "Service" (vehicles included in service by definition, see Section 203(a)(19)); Section 204(a)(2), "equipment"; Section 204(a)(3), "standards of equipment"; Section 208(a), "equipment" (used in the sense of vehicles); Section 209(b), "equipment" (used in the sense of vehicles); Section 216(a), "equipment and facilities"; Section 216(b), "equipment and facilities".

The specific sections of the Motor Carrier Act and the terms which by intendment necessarily include jurisdiction over sizes and weights are as follows:

Section 202(a), "inherent advantages * * * sound economic conditions * * * adequate, economical * * *

efficient * * * reasonable charges * * * without unjust discriminations, undue preferences or advantages * * * coordinate * * * properly adapted * * *"; Section 202(b), "procurement of and the provisions of facilities"; Section 204(a)(1), "continuous and adequate service * * * equipment"; Section 204(a)(2), "equipment"; Section 204(a)(3), "standards of equipment"; Section 216(a), "through routes * * * adequate service, equipment and facilities * * * reasonable individual and joint rates, fares and charges"; Section 216(b), "adequate service, equipment and facilities * * *"; Section 216(c), "through routes and joint rates"; Section 216(d), "undue or unreasonable preference or advantage to * * * person, port, gateway, locality or description of traffic * * * unreasonable prejudice or disadvantage".

Considering all of the provisions of the Act in *pari materia* it is evident that without some jurisdiction over sizes and weights, the Commission would be without power over "safety", "service", and "through routes", and without power to prevent discriminations against persons, ports, places, and traffic.

The Motor Carrier Act, 1935, is a general, complete and exclusive Act which, upon the promulgation of regulations by the Interstate Commerce Commission, supersedes all State Laws which are inconsistent with the purposes and objectives of the Federal Law.

The South Carolina Act covering sizes and weights shows on its face that it may conflict with the Federal Law because both deal specifically with the matters of safety and standards of equipment. The State Act may be inconsistent with the Federal Act because the Federal Act takes full jurisdiction over safety, adequate service and proper charges. There is an indis-

soluble relationship between safety, service and charges and the sizes and weights of equipment.

Definition of Equipment

Under the rules of statutory construction, the term "equipment", lacking a prescribed definition, takes the definition recognized in the amended or supplemented Act. In the Interstate Commerce Act, Part I, Sections 1(10); 1(15); 20(1); 1(21), equipment generally refers to vehicles (Interstate Commerce Act, Annotated, Vol. V, General Index, page 4188). In the same Act, safety devices are distinguished from "equipment" by the term "safety appliances" (Interstate Commerce Act, Annotated, Vol. V, General Index, page 4342).

Joint Boards

Instead of stripping the States of all powers, Congress devised a plan of cooperation with the States through Joint Boards created under Section 205 of the Motor Carrier Act. Under this section, the States have jurisdiction which they never had before.

Through Routes and Joint Rates

Congress has taken jurisdiction over "through routes" and "joint rates" and these are terms which were thoroughly understood in the administration of Part I of the Interstate Commerce Act. These terms contemplate that equipment, such as semi-trailers, shall be interchangeable between carriers. The equipment moves through from consignor to consignee, regardless of the number of carriers participating in the "through routes and joint rates" and regardless of the number of States or the variations in State laws as to the width of trucks.

The carriers could not establish and the Commission could not enforce requirements in connection with "through routes and joint rates" if the States could prescribe different widths, heights, and lengths of vehicles at every State line. Through routes and joint rates with interchange of equipment are now in effect in large areas involving many States.

Rail-Motor Coordination

The provisions of the Motor Carrier Act with respect to coordination of transportation by motor carriers and rail carriers is in effect over areas involving several States. Under one of the plans for coordination, which has been approved by the Commission, semi-trailers are pulled by tractors to the railroads and loaded on flat cars, shipped long distances, unloaded in different States and continue the journey under tractor power to the consignee. This plan has a tendency to relieve the highways of certain traffic, but the plan would be entirely defeated if the State in which the consignee may be located could impose a regulation radically different from that of the State of the consignor.

Discriminations

The size of the payload has a direct and substantial bearing on the rates which shippers are required to pay. This feature of operation and regulation is strikingly illustrated in a report of the Interstate Commerce Commission, In the Matter of Container Service, 182 I. C. C. 653. This case involved transportation by motor vehicles which were operated by railroads. At page 663 is set forth a schedule of charges based on minimum payload weights. For a minimum of 6,000 pounds the rate is 40c per hundred pounds and for a

minimum of 10,000 pounds the rate is 30c per hundred pounds, and for 20,000 pounds the rate is 20c per hundred pounds. If this principle of rate making be applied to those shippers affected by the four or five States with low gross weight limitation, a consignor shipping merchandise into or across South Carolina could not possibly ship over 10,000 pounds in one vehicle, therefore, he could not get a rate lower than 30c, but the consignor shipping through North Carolina could ship 20,000 pounds and thereby get a rate of 20c per hundred. In Texas, the consignor could not ship more than 7,000 pounds, therefore, he would have to pay 40c per hundred pounds.

Tariff Conflicts

Motor carriers publish tariffs based on volume ratings and when these tariffs are filed with the Interstate Commerce Commission, they have the effect of law and are binding on the motor carriers and shippers alike. Due to conflicting State laws, motor carriers are prevented from handling volume ratings in certain States, and it becomes necessary for the carriers to publish an exception to their tariffs. The exception withholds volume ratings from shippers when the goods are to move into or across the States having low weight limitations.

It is obvious that there is a direct conflict between the State and the Federal Law and it is impossible for motor carriers to comply with both laws. When the carriers refuse to handle volume ratings in order to comply with the State law, they violate their tariff obligations and duties as common carriers. If they publish higher rates for a smaller volume only, they immediately discriminate between persons and places

and come in conflict with Sections 216(b) and (d) of the Motor Carrier Act, which prohibit discriminations.

The Commission has already suspended several interstate tariffs based on quantities permitted by State laws because the economic loss burdened interstate commerce.

Truck Sizes and Traffic Quantities

Interstate transportation by motor carriers was in its infancy when the Interstate Commerce Commission made its report, Coordination of Motor Transportation, 182 I. C. C. 263, and at page 424 stated that trucks operated by common and contract carriers showed only 11 per cent between 1½ and 3 tons capacity; 60 per cent were from 3½ to 5 tons capacity, and 29 per cent over 5 tons capacity. Today 10 tons or 20,000 pounds is the average unit of interstate commerce in goods and manufacture. Federal Coordinator of Transportation—Freight Traffic Report—page 31—May 6, 1935.

Safety

Surely, it cannot be said that, under the safety provisions of the Motor Carrier Act, 1935, the Commission is without power to limit the height of motor vehicles to prevent them from being topheavy and dangerous. This Court, in sustaining the judgment of the Legislature, stated that weight and width are related to safety. There are no limitations on the authority of the Interstate Commerce Commission to prescribe safety regulations. There are no height limitations in Massachusetts, Maryland, Illinois, Connecticut, and New Hampshire. It cannot be said that Congress has acted with respect to these States and

not as to other States, nor can it be said that Congress has not acted with respect to safety. Some States permit combinations of numerous vehicles, aggregating great length, up to 85 feet, such as Arizona. Permissible gross weights for trucks range from 9 tons in Kentucky to 55 tons in Nevada.

Appellees submit that if the Commission should find that in the interest of safety lower standards should be prescribed, it now has power to do so without further legislation and to impose and enforce suitable regulations; existing State laws notwithstanding.

The Commission in its first safety order, issued December 23, 1936, Ex Parte MC-4, 1 M.C.C. 1, at page 5, gave as part of its program the regulation of "Motor-Vehicle Standards (Sizes and Weights)" and at page 15 it said: "These parts and accessories are important factors in safe operation, but the motor vehicle itself, and particularly its size and weight, must also be considered. We are empowered by the Act to investigate this subject. At least insofar as the regulation of sizes and weight of motor vehicles and combinations thereof has a bearing on safety of operation in interstate or foreign commerce, we believe that we now have authority to undertake such regulation. If it should prove that additional Federal legislation is needed to protect the public interest with respect to this matter, it will be our duty under Section 204(a)(7) of the Act to report to Congress accordingly".

This shows the relationship between safety and sizes and weights as understood by the Commission. It will be noted that with reference to further legislation on the subject of "Sizes and Weights" they referred to Section 204(a)(7) and not to Section 225.

On November 8, 1937, in Ex Parte No. MC 15, the

Commission issued its order for an investigation for the purpose of prescribing "Sizes and Weights".

The order follows in full:

"ORDER

"At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of November, A .D. 1937.

"EX PARTE NO. MC. 15

"IN THE MATTER OF REGULATIONS GOVERNING THE SIZES AND WEIGHT OF MOTOR VEHICLES AND COMBINATIONS OF MOTOR VEHICLES USED BY COMMON AND CONTRACT CARRIERS IN THE TRANSPORTATION OF PASSENGERS AND BY COMMON, CONTRACT, AND PRIVATE CARRIERS IN THE TRANSPORTATION OF PROPERTY IN INTERSTATE OR FOREIGN COMMERCE

"Section 204(a)(1), (2), and (3), and Section 225 of the Motor Carrier Act, 1935, being under consideration, and good cause appearing therefor:

"*It is ordered*, That investigation be, and it is hereby, instituted into the above-described matter for the following purposes:

"1. To enable the Commission to make a report under the provisions of Section 225 on the need for Federal regulation of the sizes and weight of motor vehicles and combinations thereof, and

"2. To enable the Commission to prescribe reasonable requirements under the provisions of Section 204 of the Act as to the sizes and weight of motor vehicles and combinations

thereof insofar as they affect the safety of operation.

"*It is further ordered*, That notice of this proceeding be given to common and contract carriers by motor vehicle and private carriers of property by motor vehicle, as defined in Part II of the Interstate Commerce Act, and other interested parties by such means as the Commission may hereafter adopt and use for that purpose, including the posting of a notice in the office of the Commission's Secretary.

"*And it is further ordered*, That this proceeding be assigned for hearing at such time and place as the Commission may hereafter direct.

"By the Commission.

"W. P. BARTEL,
(SEAL) "*Secretary.*"

SECTION 225—MOTOR CARRIER ACT

It will be noted that Section 225 speaks of *reports* on the need for *regulation*, whereas Section 204 (a) (7) provides for *recommendations* with respect to *legislation*.

Standing alone, Section 225 could possibly be construed as reserving for further consideration legislation, on the subject of sizes and weights of either interstate or intrastate vehicles, or both, as distinguished from regulations under authority delegated to the Interstate Commerce Commission.

Standing alone, it can be construed as a mere matter of procedure to be followed by the Commission in prescribing regulations covering sizes and weights of interstate trucks *and has been so construed by the Interstate Commerce Commission.*

Considered with the Motor Carrier Act as a whole,

it cannot be construed to nullify the Act by defeating its administration. The language employed, though admittedly unfortunate, is susceptible of interpretation consistent with the Act.

The legislative history of the Motor Carrier Act shows that Section 225 was not added to the Bill as introduced, but on the contrary many of the important features of the Act were added subsequent to the inclusion of Section 225. Among such provisions were those in Section 202(a) regarding the preservation of the inherent advantages of motor transportation and reasonable charges therefor without unjust discriminations, undue preferences or advantages. In Section 202(b) there was added the provision giving the Commission jurisdiction over the provision of facilities for transportation. In Section 203(b) standards of equipment were added and repeated in Section 203(b)(7). All of Section 204(a)(3) was added.

The proviso in Section 208(a) regarding equipment was added, and likewise the proviso in Section 209(b), regarding equipment was added. The provisions of Section 216(b) and (c) were added in their entirety. The reservation of power to the States as contained in the proviso at the end of Section 216(e) was added, and Congress did not see fit to reserve to States police powers over interstate commerce.

Congress considered whether it should leave the matter of weights and sizes to the Commission or incorporate regulations in the Act, and it decided to give the Commission jurisdiction for the present. It will be further noted that Section 225 refers to "all motor carriers" whereas the Motor Carrier Act deals only with interstate carriers. If upon investigation by the Commission, it should be found that in order to provide for

the safety of interstate commerce on Federal Aid Interstate Highways, and to protect the investment of the United States in these highways, it should be necessary to regulate the sizes and weights of intrastate traffic, Congress under its plenary powers can do so, as it has already done with respect to the maintenance and repair of such highways. (Federal Aid Act of 1921, Public Law, No. 87, 67th Congress). The inclusion of the word "all" could be construed to refer to such a contingency and to the need for further legislation applicable to intrastate commerce.

All investigations by the Interstate Commerce Commission are called "Reports" and have always been required by law as a condition precedent to the issuance of Orders by the Commission. Sec. 14, Part I. Section 225 of Part II merely prescribes that the usual procedure be observed in connection with the Commission's Orders involving weights and sizes and qualifications and hours of employes.

Legislative History

The following quotations from the *Congressional Record*, 74th Congress, First Session, Vol. 79, are enlightening on the question as to whether Section 225 is to be construed as a limitation on the Commission's authority over sizes and weights, or is to be construed as a procedural requirement, as Appellees contend.

Page 5877, Mr. Wheeler, speaking of the provisions of Section 204 relating to safety of operation and equipment: "This provision, however, is only operative after investigation by the Interstate Commerce Commission and if need is found for such regulation."

Page 5878, Mr. Wheeler, speaking of private carriers and equipment, Section 204(a)(3), said: "Such

regulation is conditioned upon the finding, after investigation, of need therefor * * *."

Page 5879, Mr. Wheeler, speaking of the development of the Act and the requirements in connection with qualifications and maximum hours of service, which terms are mentioned in Section 204, said: "* * * that the Commission felt that they would like first to make a study of the matter, and then come back and report to Congress, *or be given permission* to establish these requirements later; we leave it as the Commission suggested, *giving them power to make the investigation, and if and when they found it necessary to put in effect such rules and regulations as they might deem necessary.*"

Continuing and speaking of the provisions of Section 204 as to all three classes of carriers, the Senator said: "The exercise of this power with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for regulation of this kind provided for in Section 225 * * *." "The investigation referred to will permit the Commission not only to develop whether there is need for regulation, but also to establish requirements * * * like authority has been conferred respecting the safety of operation and equipment of private carriers."

Page 5884, Senator Wheeler, speaking of Section 225, pointed out that the investigation to be made was to establish the need for regulation of sizes and weights and of qualifications and maximum hours and that the investigation would "serve to lay the basis for types of regulation which are adapted to the special and varied conditions surrounding the operations of such motor vehicles."

Page 5887, Senator Wheeler, speaking of Section 225 and the investigation provided therein said: "Then we gave them the power in Section 204—to supervise and regulate * * * safety of operation and equipment."

Page 5887, Senator Couzens, remarked that Section 225 would not give the Commission authority to prescribe but only to investigate, and Senator Wheeler answered him as follows: "But on page 10, in Section 204, the Commission is given the power to establish reasonable requirements with respect to the qualifications and maximum hours of service of employes, and the safety of operations and equipment."

Page 12707, Mr. Terry, said: "* * * But what hours shall be observed; what regulations in regard to safety shall be used, depend entirely on the type and character of the service and the type and character of the bus or truck * * *." Mr. Terry, discussing Section 225, said: "In the powers given to the Commission in reference to the regulation of common carriers, it is provided: 'Regulate the maximum hours of service of employes and safety of operation and equipment,' " and then he discusses contract carriers and private carriers and urges the House to vote down an amendment which would write certain standards for hours of service into the bill, because the Committee desires the Interstate Commerce Commission to make this investigation and then provide accordingly.

It would seem to be clear that the investigation which the Commission is required to make is only for the purpose of determining the need for regulation of sizes and weights and for the purpose of determining requirements which would be suitable for different sections of the country. After they have made their

investigation and report, the Commission is authorized to prescribe, to the extent necessary to administer the Act.

There was before Congress the question of regulations suitable for the various sections of the country. The variations between sections were the factors which led Congress to authorize the Commission to investigate and prescribe instead of writing standards into the Bill.

THE INTENT OF CONGRESS WITH RESPECT TO POLICE POWERS

The intent of Congress, the circumstances of the times, and the evils which Congress sought to reach, may be determined not only from the terms of the Act, but from the legislative history.

The Act clearly states the powers which Congress wished to reserve to the States. Section 202(c), reserved the power of taxation and the regulation of intrastate commerce. Section 216(e), reserved jurisdiction over intrastate rates, even though such rates discriminated against interstate commerce. When Congress specifies reservations of powers to the States, that which is not specified is not reserved.

The legislative history shows that Congress did not intend to reserve to the States unlimited police powers over interstate commerce on interstate highways, which powers would impair service, facilities, and burden the commerce among the States.

The Rayburn Bill, H. R. 6836, 73rd Congress, Second Session, undertook to reserve police powers to the States, and Congress took 453 pages of testimony, much of which was to the effect that reservations of police powers to the States would constitute undue

restrictions on the powers of Congress and defeat the purposes of the Act, to secure uniformity and equality (House Committee Hearings on H. R. 6836). The Bill did not pass.

The next year the Wheeler Bill was introduced, S. 1629 and H. R. 5262. The Wheeler Bill did not reserve police powers to the States. The States, acting through their national organization, tried to have the Bill amended to reserve police powers. Both House and Senate Committees rejected the amendment and when it was offered on the floor it was voted down. *Congressional Record*, Vol. 79, pp. 5953, 5954.

DISCUSSION—POINT 2

Prior to the Motor Carrier Act, 1935, the States may have had the power to enact legislation designed to favor transportation of passengers by bus over transportation of freight by truck. They may also have had the power to strangle transportation of property by truck in favor of transportation of property by railroad.

Regulations of this type are made effective by prescribing width limitations for buses consistent with the standards in effect throughout the United States; whereas in the case of trucks, lower standards are prescribed, having the effect of erecting a blockade at the State line. In other cases, dual standards of weight limitations are prescribed for trucks, the higher standard applying when trucks deliver their cargo to railroad stations, and a drastically lower standard applying when the transportation is completed to destination by trucks.

South Carolina, for example, limits trucks (except exempted classes and those covered by local permits)

to 90 inches in width, but permits 96 inches for buses. Act 888, approved June 11, 1936, allows 96 inches for buses.

Clearly, this must be a regulation of the authority to operate as distinguished from a safety regulation. It would be difficult to justify the proposition that a 90-inch width was necessary for the safety of freight, but that the safety of passengers and the public was accommodated with a 96-inch width for buses.

In Texas, motor carriers of freight may haul 7 tons to the nearest railroad station but only 3½ tons if they pass the railroad station. House Bill 336, Chapter 282, page 507, General Laws, Regular Session, 42nd Legislature, Section 7, amending by adding Section 5 b, Chapter 42, General Laws of Texas, passed by the 41st Legislature, Second Called Session. (As the reference is for illustration only, the Act is not set out.) No such method of restricting gross weights, axle weights, or cargo weights is applied to buses.

Kentucky restricts the gross weight of trucks to 18,000 pounds but buses weighing 25,000 pounds or more are permitted to operate, and do operate, over the same highways. Act of March 11, 1932, Section 1, covering definitions applies to trucks and exempts buses, and Section 3 fixes gross weight at 18,000 pounds. (As the reference is for illustration only, the Act is not set out.)

Regulations of the type described are in *purpose and effect* regulation of the authority to engage in interstate commerce. The Interstate Commerce Commission now has exclusive jurisdiction to grant or deny certificates of convenience and necessity for operations in interstate commerce and no State can deprive the

Commission of its jurisdiction by resorting to subterfuge.

Conceivably some color of justification or argument can be advanced linking every State action with some purported exercise of police powers under the guise of safety or protection of the highways. If the Federal Courts may not review the "judgment" of the legislation to determine the bona fides or reasonableness of such legislation, the States are left free to nullify every provision of the Motor Carrier Act, 1935, and every Order of the Commission pursuant thereto.

This Court has repeatedly held that to the extent Congress has exerted its paramount power over the subject of interstate commerce, that the authority of the State is at an end, irrespective of whether the State regulation is consistent, complimentary or for a different purpose.

"That the purpose of Federal regulation of commerce is to secure continuous transportation from one end of the country to the other entirely free from any impositions by State authorities." *Wabash St. L. & P. R. Co.* vs. *Illinois*, 118 U. S. 557.

"The Federal power may be exercised to *require* carriers to be *equipped* to perform the requisite public service." *Dayton-Goose Creek Ry. Co.* vs. *U. S.*, 263 U. S. 456. A provision for such requirements is contained in the Motor Carrier Act, 1935.

This Court had said, "The principle of duality in our system of government *does not* touch the authority of Congress in the regulation of foreign commerce." *Board of Trustees of University of Illinois* vs. *U. S.*, 289 U. S. 48, 57.

In prior cases it has been said that the power to regu-

late interstate commerce is as broad as the power to regulate foreign commerce.

Brown vs. *Houston*, 114 U. S. 622; *Bowman* vs. *C. & N. W. R. Co.*, 125 U. S. 465; *Crutcher* vs. *Kentucky*, 141 U. S. 47; *Pittsburgh & S. Coal Co.* vs. *Bates*, 156 U. S. 577.

In the present case this Court has said that the police powers of the State are "not divisible". Under those circumstances, the police power of the State must end, to the extent that Congress occupied the field of regulation of interstate commerce and such means as Congress may adopt "may have the quality of police regulations". *Hoke* vs. *U. S.*, 227 U. S. 308.

"Commerce between the States has been confided exclusively to Congress and *is not within the jurisdiction of the police power of the State*, unless placed there by Congressional action." *Leisy* vs. *Hardin*, 135 U. S. 100.

Federal regulation is exclusive when Congress has acted and occupied the field. *There can be no divided authority over the same subject matter. Mo. Pac. R. Co.* vs. *Stroud*, 267 U. S. 404; *Northern Pac. R. Co.*, vs. *State of Washington*, 222 U. S. 370; *Erie R. Co.* vs. *State of New York*, 233 U. S. 671.

Even a casual examination of the Motor Carrier Act discloses the extent to which Congress has occupied the field and *a fortiori*, the extent to which the States have been excluded. Whether the State regulation be for the same or a different purpose, Congress having acted under the Motor Carrier Act, such action excludes State regulation; whether consistent, complimentary, additional or otherwise and coincidence is as ineffective as opposition and a State statute is not to be declared a help because it attempts to go further than

Congress has seen fit to go. *Gilvary* vs. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57; *Charleston & W. C. Ry. Co.* vs. *Varnville Furniture Co.*, 237 U. S. 597.

The extent to which this Court has gone in suspending the police powers of the State is illustrated in the case of *Oregon-W. R. Nav. Co.* vs. *State of Washington*, 270 U. S. 87. In that case it was held that the State power to quarantine against the importation of farm produce likely to convey injurious insects was suspended, as to interstate commerce, by U. S. Code, Title 7, Sec. 161, investing the Secretary of Agriculture with full authority over the subject. It was held that such an act cannot be construed as leaving the State at liberty to establish quarantine in the absence of action by the Secretary of Agriculture.

That a State cannot enforce any law obstructing interstate commerce and the name, description, or characterization of an Act by a State Legislature or by State Courts, will not necessarily control all questions of whether it interferes with or burdens interstate commerce and such determination is a Federal question. *La Coate* vs. *Dept. of Conservation of La.*, 263 U. S. 545.

State statutes which by their necessary operation directly interfere with or burden commerce are prohibited regulations and invalid regardless of the purpose with which it was enacted. *Schafer* vs. *Farmer's Grain Co.*, 268 U. S. 189; *Di Santo* vs. *Commonwealth of Pa.*, 273 U. S. 34; *Interstate Buses Corp.* vs. *Holyoke St. Ry. Co.*, 273 U. S. 45.

In the instant case the subject is transportation of interstate commerce which Appellees submit never has been a subject reserved to the States. It is a subject which the States may touch only through the silence

of Congress, and Congress has *ceased to be silent.* The Motor Carrier Act completely occupies the field and whether or not the Motor Carrier Act be construed to vest in the Commission jurisdiction over sizes and weights, as such, the Commission nevertheless has full jurisdiction to make such regulations as may be necessary to effectuate the provisions of the Act. Any ruling to the contrary necessarily has the effect of forcing Congress to completely strip the States of all authority as distinguished from a cooperative plan of procedure as contemplated by the Joint Board arrangement provided for under Section 205 of the Motor Carrier Act.

The Interstate Commerce Act did not give the Commission the authority to limit the length of trains, but it has been held that the States may not do so. *Atchison T. & S. F. Ry. Co.* vs. *La Prade*, 2 Fed. Supp. 855, 861.

Inhibitive Congressional action is not essential to exclude State legislation. It is sufficient if Congress has occupied the field. *Southern R. Co.* vs. *Reed*, 222 U. S. 424.

The continuation of blanket State authority is contrary to the intent and purposes of the Motor Carrier Act, because no investigations or Reports or Orders can be made to determine the proper policy, if States may impose regulations which are economically unsound. This Court has said in similar cases: "There must necessarily be a period for adjustment." *Northern Pacific R. Co.* vs. *Washington*, 222 U. S. 370.

The decision of this Court in the instant case appears to so restrict the authority of the Federal Courts to review Acts of the Legislature that, they will be powerless to review legislative actions for the purpose of determining whether size and weight restrictions are in fact reasonable and necessary exercise of police

powers, or constitute devices for regulating the operating authority of carriers, for the imposition of discriminations between different classes of carriers, and for discriminations against interstate commerce.

HIGHWAYS

Interstate highways are essentially and fundamentally national. Federal jurisdiction would necessarily be an implied power of Federal sovereignty even in the absence of specific Constitutional provisions. A century of Congressional policy and decisions of this Court is consistent with this view. The States are not proprietors but merely trustees for the public. National defense, commerce, post roads and common welfare have necessarily made it so.

There is only one Commerce Clause and it operates to the same extent with respect to all transportation and facilities for transportation including land highways. *California* vs. *Pacific Railroad Co.*, 127 U. S. 1, 39; *Luxton* vs. *North River Bridge Co.*, 153 U. S. 525; *Monongahela Nav. Co.* vs. *U. S.*, 148 U. S. 312.

In addition to more than $2,000,000,000 cash, invested since 1916, millions of acres of land grants have been made to aid in the construction of highways. Beginning with 1802 and continuing down to 1864, and in connection with the admission of Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Missouri, Arkansas, Michigan, Iowa, Wisconsin, Minnesota, Oregon, Kansas, and Nevada into the Union, there have been Federal land grants for highways. In some instances the grants have been exclusively for interstate highways; in some cases for both interstate and intrastate highways; and in some cases for intrastate highways.

Various Federal Acts have declared highways to be post roads.

CONCLUSION

Justice Stone said, in *Borden's Co.* vs. *Baldwin*, 293 U. S. 194: "We are in accord with the view that it is inexpedient to determine grave Constitutional questions upon a demurrer to a complaint or upon an equivalent motion, if there is a reasonable likelihood that the productions of evidence will make the answer clearer." Appellees contend that the failure of the Court below to take evidence on the question of the effect of the State Act on the administration of the Motor Carrier Act, 1935, was in effect equivalent to decision on a motion.

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted:

That the Decree of the District Court of the United States for the Eastern District of South Carolina be not affirmed with respect to that portion of the decision construing, without evidence, the Motor Carrier Act, 1935, as having the effect of leaving the Interstate Commerce Commission without jurisdiction to make such regulations as may be necessary, with respect to safety, service, and the prevention of discrimination between persons and places, and sound economic conditions within the motor transportation industry.

That the case be remanded for further proceedings to take evidence for the purpose of determining whether the size and weight restrictions of South Carolina defeat the purposes of the Motor Carrier Act, 1935, and for the purpose of determining whether such restrictions discriminate against interstate commerce by truck in favor of interstate commerce by bus and

thereby usurp the prerogatives of the Commission with respect to operating authority.

Respectfully submitted,

BARNWELL BROS., INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL,
Appellees.

By J. NINIAN BEALL

March 10, 1938.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for the respective Appellees and Petitioners in the foregoing Petition, and that the same is presented in good faith and not for delay.

J. NINIAN BEALL

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SUPREME COURT OF THE UNITED STATES.

No. 161.—October Term, 1937.

South Carolina State Highway Department, South Carolina Public Service Commission, et al., Appellants,

vs.

Barnwell Brothers, Inc., Poole Transportation, Inc Horton Motor Lines, Inc., et al.

Appeal from the District Court of the United States for the Eastern District of South Carolina.

[February 14, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

Act No. 259 of the General Assembly of South Carolina, of April 28, 1933, 38 Stat. 340, prohibits use on the state highways of motor trucks and "semi-trailer motor trucks" whose width exceeds 90 inches, and whose weight including load exceeds 20,000 pounds. For purposes of the weight limitation § 2 of the statute provides that a semi-trailer motor truck, which is a motor propelled truck with a trailer whose front end is designed to be attached to and supported by the truck, shall be considered a single unit. The principal question for decision is whether these prohibitions impose an unconstitutional burden upon interstate commerce.

Appellees include the original plaintiffs below, who are truckers and interstate shippers; the Interstate Commerce Commission; and certain others who were permitted to intervene as parties plaintiff. The suit was brought in the district court for eastern South Carolina against various state officials, to enjoin them from enforcing §§ 4 and 6 of the Act among others,[1] on the ground that they have been superseded by the Federal Motor Carrier Act of 1935, c. 498, 49 Stat. 546; that they infringe the due process clause of the

[1] § 4. Weight.—No person shall operate on any highway any motor truck or semi-trailer truck [sic] whose gross weight, including load, shall exceed 20,000 pounds.

§ 6. Width.—No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches.

Fourteenth Amendment; and that they impose an unconstitutional burden on interstate commerce. Certain railroads interested in restricting the competition of interstate motor carriers were permitted to intervene as parties defendant.

The district court of three judges, after hearing evidence, ruled that the challenged provisions of the statute have not been superseded by the Federal Motor Carrier Act, and adopted as its own the ruling of the state Supreme Court in *State ex rel. Daniel* v. *John P. Nutt Co.*, 180 S. C. 19, that the challenged provisions, being an exercise of the state's power to regulate the use of its highways so as to protect them from injury and to insure their safe and economical use, do not violate the Fourteenth Amendment. But it held that the weight and width prohibitions place an unlawful burden on interstate motor traffic passing over specified highways of the state, which for the most part are of concrete or a concrete base surfaced with asphalt. It accordingly enjoined the enforcement of the weight provision against interstate motor carriers on the specified highways, and also the width limitation of 90 inches, except in the case of vehicles exceeding 96 inches in width. It exempted from the operation of the decree, bridges on those highways "not constructed with sufficient strength to support the heavy trucks of modern traffic or too narrow to accommodate such traffic safely", provided the state highway department should place at each end of the bridge proper notices warning that the use of the bridge is forbidden by trucks exceeding the weight or width limits and provided the proper authorities take the necessary steps to enforce the law against such use of the bridges. The case comes here on appeal under § 266 of the Judicial Code.

The trial court rested its decision that the statute unreasonably burdens interstate commerce, upon findings, not assailed here, that there is a large amount of motor truck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced, and upon its conclusion that, when viewed in the light of their effect upon interstate commerce, these restrictions are unreasonable.

To reach this conclusion the court weighed conflicting evidence and made its own determinations as to the weight and width of motor trucks commonly used in interstate traffic and the capacity of the specified highways of the state to accommodate such traffic

without injury to them or danger to their users. It found that interstate carriage by motor trucks has become a national industry; that from 85 to 90% of the motor trucks used in interstate transportation are 96 inches wide and of a gross weight, when loaded, of more than ten tons; that only four other states prescribe a gross load weight as low as 20,000 pounds; and that the American Association of State Highway Officials and the National Conference on Street and Highway Safety in the Department of Commerce has recommended for adoption weight and width limitations in which weight is limited to axle loads of 16,000 to 18,000 pounds and width is limited to 96 inches.

It found in detail that compliance with the weight and width limitations demanded by the South Carolina Act would seriously impede motor truck traffic passing to and through the state and increase its cost; that 2,417 miles of state highways, including most of those affected by the injunction, are of the standard construction of concrete or concrete base with asphalt surface, 7½ or 8 inches thick at the edges and 6 or 6½ inches thick at the center; that they are capable of sustaining without injury a wheel load of 8,000 to 9,000 pounds or an axle load of double those amounts, depending on whether the wheels are equipped with high pressure or low pressure pneumatic tires; that all but 100 miles of the specified highways are from 18 to 20 feet in width; that they constitute a connected system of highways which have been improved with the aid of federal money grants, as a part of a national system of highways; and that they constitute one of the best highway systems in the southeastern part of the United States.

It also found that the gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but that the appropriate factor to be considered is wheel or axle weight; that vehicles engaged in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that gross loads of more than 20,000 pounds can be carried over concrete roads without damage to the surface; that a gross weight limitation of that amount, especially as applied to semi-trailer motor trucks, is unreasonable as a means of preserving the highways; that it has no reasonable relation to safety of the public using the highways; and that the width limitation of 90 inches is unreasonable when applied to standard concrete highways of the state, in view of the fact that all other states permit a width

of 96 inches, which is the standard width of trucks engaged in interstate commerce.

In reaching these conclusions, and at the same time holding that the weight and width limitations do not infringe the Fourteenth Amendment, the court proceeded upon the assumption that the commerce clause imposes upon state regulations to secure the safe and economical use of highways a standard of reasonableness which is more exacting when applied to the interstate traffic than that required by the Fourteenth Amendment as to all traffic; that a standard of weight and width of motor vehicles which is an appropriate state regulation when applied to intrastate traffic may be prohibited because of its effect on interstate commerce, although the conditions attending the two classes of traffic with respect to safety and protection of the highways are the same.

South Carolina has built its highways and owns and maintains them. It has received from the federal government, in aid of its highway improvements, money grants which have been expended upon the highways to which the injunction applies. But as the district court held, Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic, and has left undisturbed whatever authority in that regard the states have retained under the Constitution.

But appellees do not challenge here the ruling of the district court that

While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to cur-

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[2] State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. Hall *v.* DeCuir, 95 U. S. 485, 497-498; Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557, 575-578; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, 498; Western Union Telegraph Co. *v.* James, 162 U. S. 650, 659, with which compare Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 347, 358; Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1, with which compare Geer *v.* Connecticut, 161 U. S. 519, and New York ex rel. Silz *v.* Hesterberg, 211 U. S. 31; Baldwin *v.* Seelig, 294 U. S. 511, 524; see Western Union Telegraph Co. *v.* Kansas, *supra*, 27 *et seq.*

Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state. See Cooley *v.* Board of Port Wardens, 12 How. 299, 315; Gilman *v.* Philadelphia, 3 Wall. 713, 731; Escanaba Co. *v.* Chicago, 107 U. S. 678, 683; Lake Shore & M. S. R. Co. *v.* Ohio ex rel. Lawrence, 173 U. S. 285, 294; cf. Pound *v.* Turck, 95 U. S. 459, 464; Cloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 205; Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 499.

tail state power in some measure,[3] it did not forestall all state action affecting interstate commerce. Ever since *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell* v. *North Carolina*, 187 U. S. 622, 626.[3] It was to end these practices that the commerce clause was adopted. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 187; *Brown* v. *Maryland*, 12 Wheat. 419, 438-439; *Cooley* v. *Board of Port Wardens, supra; State Freight Tax*, 15 Wall. 232, 280; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 289, 297-298; *Cook* v. *Pennsylvania*, 97 U. S. 566, 574; *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217; *Baldwin* v. *Seelig*, 294 U. S. 511, 522; II Farrand, Records of the Federal Convention, 308; III *id.* 478, 547, 548; The Federalist, No. XLII; 1 Curtis, History of the Constitution, 502; Story on the Constitution, § 259. The commerce clause has also been thought to set its own limitation upon state control of interstate rail carriers so as to preclude the subordination of the efficiency and convenience of interstate traffic to local service requirements.[4]

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[3] Footnote 2, *supra*.

[4] See Illinois Central R. Co. v. Illinois, 163 U. S. 142; C. C. C. & St L. R. Co. v. Illinois, 177 U. S. 514; Mississippi R. R. Comm'n. v. Illinois Central R. Co., 203 U. S. 335; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328; Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135; Chicago, B. & Q. R. Co. v. Railroad Comm'n. of Wisconsin, 237 U. S. 220; St. Louis & San Francisco R. Co. v. Public Service Comm'n. of Missouri, 254 U. S. 535. Compare Gladson v. Minnesota, 166 U. S. 427; Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence, 173 U. S. 285; Gulf, C. & S. F. R. Co. v. Texas, 246 U. S. 58, where statutes requiring local service no greater than necessary for fair accommoda-

But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.

From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 416. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. *Id.* With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.[5]

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tion of local needs were held constitutional. Although the states have usually been allowed to impose burdens on interstate railroads in the interest of local safety, Smith *v.* Alabama, 124 U. S. 465; Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96; New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628; Chicago, R. I. & P. R. Co. *v.* Arkansas, 219 U. S. 453; St. Louis, I. M. & S. R. Co. *v.* Arkansas, 240 U. S. 518; *cf.* Hennington *v.* Georgia, 163 U. S. 299, an unnecessarily harsh restriction, even though it is in the interest of safety, has been held to be unconstitutional. Seaboard A. L. Railway *v.* Blackwell, 244 U. S. 310.

[5] Among the state regulations materially affecting interstate commerce which this Court has upheld, Congress not acting, are those which sanction obstruc-

The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But "In the absence of national legislation specially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use applicable alike to vehicles moving in interstate commerce and those of its own citizens." *Morris* v. *Duby*, 274 U. S. 135, 143. This formulation has been repeatedly affirmed, *Clark* v. *Poor*, 274 U. S. 554, 557; *Sprout* v. *South Bend*, 277 U. S. 163, 169; *Sproles* v. *Binford*, 286 U. S. 374, 389, 390; cf. *Morf* v. *Bingaman*, 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. It has upheld weight limitations lower than those presently imposed, applied alike to motor traffic moving interstate and intrastate. *Morris* v. *Duby, supra; Sproles* v. *Binford, supra.* Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained. *Sproles* v. *Binford, supra;*

tions in navigable rivers, Willson *v.* Black-Bird Creek Marsh Co., 2 Pet. 245; Ex parte McNeil, 13 Wall. 236; Pound *v.* Turck, 95 U. S. 459; Wilson *v.* McNamee, 102 U. S. 572; Huse *v.* Glover, 119 U. S. 543; cf. Sands *v.* Manistee River Improvement Co., 123 U. S. 288; approve the erection of bridges over navigable streams, Gilman *v.* Philadelphia, 3 Wall. 713; Escanaba Co. *v.* Chicago, 107 U. S. 678; Cardwell *v.* American Bridge Co., 113 U. S. 205; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1; Lake Shore & M. S. R. Co. *v.* Ohio, 165 U. S. 365; require payment of fees as an incident to use of harbors, Cooley *v.* Board of Port Wardens, 12 How. 299; Steamship Co. *v.* Joliffe, 2 Wall. 450; Anderson *v.* Pacific Coast S. S. Co., 225 U. S. 187; Clyde Mallory Lines *v.* Alabama ex rel. State Docks Comm'n., 296 U. S. 261; cf. County of Mobile *v.* Kimball, 102 U. S. 691; control the location of docks, Cummings *v.* Chicago, 188 U. S. 410; impose wharfage charges, Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Transportation Co. *v.* Parkersburg, 107 U. S. 691; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; establish inspection and quarantine laws, Turner *v.* Maryland, 107 U. S. 38; Morgan's S. S. Co. *v.* Louisiana Board of Health, 118 U. S. 455; Patapsco Guano Co. *v.* North Carolina Board of Agriculture, 171 U. S. 345; Rasmussen *v.* Idaho, 181 U. S. 198; Smith *v.* St. Louis & S. W. R. Co., 181 U. S. 248; Reid *v.* Colorado, 187 U. S. 137; New Mexico ex rel. McLean & Co. *v.* Denver & R. G. R. Co., 203 U. S. 38; Asbell *v.* Kansas, 209 U. S. 251; Red "C" Oil Mfg. Co. *v.* Board of Agriculture, 222 U. S. 380; Savage *v.* Jones, 225 U. S. 501; Pure Oil Co. *v.* Minnesota, 248 U. S. 158; Mintz *v.* Baldwin, 289 U. S. 346; cf. Railroad Co. *v.* Husen, 95 U. S. 465; Minnesota *v.* Barber, 136 U. S. 313; Brimmer *v.* Rebman, 138 U. S. 78; and regulate the taking or exportation of domestic game, Geer *v.* Connecticut, 161 U. S. 519; New York ex rel. Silz *v.* Hesterberg, 211 U. S. 31; cf. Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1, 13, holding invalid a local regulation ostensibly designed to conserve a natural resource but whose purpose and effect were to benefit Louisiana enterprise at the expense of businesses outside the state.

Bradley v. *Public Utilities Commission of Ohio*, 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Morf* v. *Bingaman, supra;* cf. *Ingels* v. *Morf*, 300 U. S. 290.

In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *Sproles* v. *Binford, supra; Stephenson* v. *Binford*, 287 U. S. 251, 272.

Here the first inquiry has already been resolved by our decisions that a state may impose non-discriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways. In resolving the second, courts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce. And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its

opinion is best adapted to all the diverse interests affected. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 695. When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 30; *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365; *Price* v. *Illinois*, 238 U. S. 446, 451; *Hadacheck* v. *Sebastian*, 239 U. S. 394, 408-414; *Thos. Cusack Co.* v. *Chicago*, 242 U. S. 526, 530; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388; *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. *Morris* v. *Duby*, *supra*, 143; *Sproles* v. *Binford*, *supra*, 389, 390; *Minnesota Rate Cases*, *supra*, 399, 400; *Smith* v. *St. Louis & S. W. R. Co.*, 181 U. S. 248, 257; *Reid* v. *Colorado*, 187 U. S. 137, 152; *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31, 42, 43.

Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. Cf. *Worcester County Trust* v. *Riley*, 302 U. S. —, —. Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. *Standard Oil Co.* v. *Marysville*, *supra*; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 263; s. c. 11 Fed. Supp. 599, 600. Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment.

At the outset it should be noted that underlying much of the controversy is the relative merit of a gross weight limitation as against an axle or wheel weight limitation. While there is evidence that weight stresses on concrete roads are determined by wheel rather than gross load weights, other elements enter into choice of the type of weight limitation. There is testimony to show that the axle or wheel weight limitation is the more easily enforced through resort to weighing devices adapted to ascertaining readily the axle or wheel weight. But it appears that in practice the weight of truck loads is not evenly distributed over axles and wheels; that commonly the larger part of the load—sometimes as much as 70 to 80%—rests on the rear axle and that it is much easier for those who load trucks to make certain that they have complied with a gross load weight limitation than with an axle or wheel weight limitation. While the report of the National Conference on State and Highway Safety, on which the court below relied, suggested a wheel weight limitation of 8,000 or 9,000 pounds, it also suggested that a gross weight limitation might be adopted and should be subject to the recommended wheel limitation. But the conference declined to fix the amount of gross weight limitation, saying: "In view of the varying conditions of traffic, and lack of uniformity in highway construction in the several States, no uniform gross-weight limitations are here recommended for general adoption throughout the country." The choice of a weight limitation based on convenience of application and consequent lack of need for rigid supervisory enforcement is for the legislature, and we cannot say that its preference for the one over the other is in any sense arbitrary or unreasonable. The choice is not to be condemned because the legislature prefers a workable standard, less likely to be violated than another under which the violations will probably be increased but more easily detected. It is for the legislature to say whether the one test or the other will in practical operation better protect the highways from the risk of excessive loads.

If gross load weight is adopted as the test it is obvious that the permissible load must be somewhat lighter than if the axle or wheel weight test were applied. With the latter the gross weight of a loaded motor truck can never exceed twice the axle and four times the wheel limit. But the fact that the rear axle may and often does support as much as 70 or 80% of the gross load, with wheel

weight in like proportion, requires that a gross load limit be fixed at considerably less than four times the permissible wheel limit.

There was testimony before the court to support its conclusion that the highways in question are capable of sustaining without injury a wheel load of 8 or 9,000 pounds, the difference depending upon the character of the tire in use, as against a wheel load of as much as 8,000 pounds, which would be possible under the statutory load limit of 20,000 pounds as applied to motor trucks, and approximates the axle limit in addition to the gross load limit recommended by the National Conference on Street and Highway Safety. Much of this testimony appears to have been based on theoretical strength of concrete highways laid under ideal conditions, and none of it was based on an actual study of the highways of South Carolina or of the subgrade and other road building conditions which prevail there and which have a material bearing on the strength and durability of such highways. There is uncontradicted testimony that approximately 60% of the South Carolina standard paved highways in question were built without a longitudinal center joint which has since become standard practice, the portion of the concrete surface adjacent to the joint being strengthened by reinforcement or by increasing its thickness; and that owing to the distribution of the stresses on concrete roads when in use, those without a center joint have a tendency to develop irregular longitudinal cracks. As the concrete in the center of such roads is thinner than that at the edges, the result is that the highway is split into two irregular segments, each with a weak inner edge which, according to the expert testimony, is not capable of supporting indefinitely wheel loads in excess of 4,200 pounds.

There is little in the record to mark any controlling distinction between the application of the gross load weight limitation to the motor truck and to the semi-trailer motor truck. There is testimony which is applicable to both types of vehicle, that in case of accident the danger from the momentum of a colliding vehicle increases with gross load weight. The record is without convincing evidence of the actual distribution, in practice, of the gross load weight over the wheels and axles of the permissible types of semi-trailer motor trucks, but this does not enable us to say that the legislature was without substantial ground for concluding that the relative advantages of a gross load over a wheel weight limitation are substantially the same for the two types, or that it could not have concluded that

they were so nearly alike for regulatory purposes as to justify the adoption of a single standard for both, as a matter of practical convenience. Even if the legislature were to accept appellees' assumption that net load weights are, in practice, evenly distributed over the wheels supporting the load of a permissible semi-trailer so that with the statutory gross load limit the load on the rear axle would be about 8,000 pounds it might, as we have seen, also conclude that the danger point would then have been reached in the case of some 1,200 miles of concrete state roads constructed without a center joint.

These considerations, with the presumption of constitutionality, afford adequate support for the weight limitation without reference to other items of the testimony tending to support it. Furthermore, South Carolina's own experience is not to be ignored. Before adoption of the limitation South Carolina had had experience with higher weight limits. In 1924 it had adopted a combined gross weight limit of 20,000 pounds for vehicles of four wheels or less, and an axle weight limit of 15,000 pounds. In 1930 it had adopted a combined gross weight limit of 12½ tons with a five ton axle weight limit for vehicles having more than two axles. Act No. 721, 33 Stat. 1182; Act No. 685, 36 Stat. 1192, 1193. In 1931 it appointed a commission to investigate motor transportation in the state, to recommend legislation, and to report in 1932. The present weight limitation was recommended by the commission after a full consideration of relevant data, including a report by the state engineer who had constructed the concrete highways of the state and who advised a somewhat lower limitation as necessary for their preservation. The fact that many states have adopted a different standard is not persuasive. The conditions under which highways must be built in the several states, their construction and the demands made upon them, are not uniform. The road building art, as the record shows, is far from having attained a scientific certainty and precision, and scientific precision is not the criterion for the exercise of the constitutional regulatory power of the states. *Sproles* v. *Binford, supra,* 388. The legislature, being free to exercise its own judgment, is not bound by that of other legislatures. It would hardly be contended that if all the states had adopted a single standard none, in the light of its own experience and in the exercise of its judgment upon all the complex elements which enter into the problem, could change it.

Only a word need be said as to the width limitation. While a large part of the highways in question are from 18 to 20 feet in width, approximately 100 miles are only 16 feet wide. On all the use of a 96 inch truck leaves but a narrow margin for passing. On the road 16 feet wide it leaves none. The 90 inch limitation has been in force in South Carolina since 1920 and the concrete highways which it has built appear to be adapted to vehicles of that width. The record shows without contradiction that the use of heavy loaded trucks on the highways tends to force other traffic off the concrete surface onto the shoulders of the road adjoining its edges and to increase repair costs materially. It appears also that as the width of trucks is increased it obstructs the view of the highway, causing much inconvenience and increased hazard in its use. It plainly cannot be said that the width of trucks used on the highways in South Carolina is unrelated to their safety and cost of maintenance, or that a 90 inch width limitation adopted to safeguard the highways of the State, is not within the range of the permissible legislative choice.

The regulatory measures taken by South Carolina are within its legislative power. They do not infringe the Fourteenth Amendment, and the resulting burden on interstate commerce is not forbidden.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.